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Pua Beng Saun & Anor v Khong Chee Meng

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(NCVC)(W)-2050–11 OF 2019
SURAYA OTHMAN, MOHD SOFIAN AND GHAZALI CHA JJCA
29 DECEMBER 2021

C *Contract — Unjust enrichment — Essential ingredients — Plaintiff and defendant contracted to jointly build commercial complex on certain lands they respectively owned — At time of contract complex was already 80% completed — Defendant without reference to plaintiff bore all expenses to complete the complex on its own and settled all sums due to chargee bank for loan given to buy the*
D *lands on which the complex stood — Whether facts showed defendant did not intend to benefit plaintiff gratuitously by its actions which enhanced value of plaintiff's lands — Whether it was unjust of plaintiff to refuse to equally share costs defendant had incurred in completing the complex and settling the loan amount due to the bank*

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The appellants and the respondent entered into an agreement under which, inter alia: (a) the respondent ('Khong') was to transfer all his shares in the second appellant ('P & K') to the first appellant ('Pua'); (b) P & K was to transfer to both Khong and Pua seven pieces of commercial land each subject
F to an existing charge on those lands; and (c) all the 14 pieces of lands were to be developed jointly by both the appellants and Khong. Khong sued the appellants in the High Court claiming that although he had performed his obligations under the contract, the appellants had not only failed to transfer to him his allotment of the seven pieces of the commercial lands but had
G unilaterally proceeded to develop all the 14 pieces of land into a badminton complex and had rented out the complex for profit thereby depriving him of his use of the lands and causing him to suffer loss and damages. Khong sought a series of reliefs against the appellants. In resisting Khong's claims, the appellants contended that they and Khong agreed to develop a badminton
H complex on the 14 lands and that although it was agreed that Khong should equally share the cost of building the complex and settling a bank loan taken to buy the lands, all costs and expenses in those respects were borne entirely by the appellants. In their counterclaim against Khong, the appellants sought payment of RM1,204,500 (ie, Khong's half share in the construction cost of
I the complex) and the sum of RM393,000 (ie his half share of the loan sum repaid to the bank plus other related charges such as quit rent and assessment). The High Court allowed Khong's claim and dismissed the appellants' counterclaim. The court held that while the appellants had not proven their counterclaim, Khong had proven his claim and shown that he was the

beneficial owner of seven pieces of the lands and accordingly, P & K held those lands on trust for Khong and Pua had to forthwith cause the transfer of the said lands to Khong with vacant possession. The court also ordered the appellants to jointly and/or severally pay Khong RM1,729,000 in damages for breaches of contract, trust and fiduciary duties and for committing trespass and denying Khong of the use of his lands. The court also awarded Khong RM30,000 in exemplary damages and granted him an injunction restraining the appellants from further using or dealing with his seven lots of the land. The instant appeal was against the High Court's decision. It was revealed during the trial that at the time the parties entered into their contract, about 80% of the construction of the badminton complex had been completed and the contract was only with regard to the completion of the remaining 20%. Khong took the position that since the appellants unilaterally proceeded to complete the complex and bear all expenses on their own, despite him telling them to stop work, they had breached the contract and he was not obliged to contribute any payment towards the completion of the complex and the principle of unjust enrichment did not apply to him.

Held, unanimously affirming the High Court's decision on Khong's claim and allowing the appellants' counterclaim:

(1) The High Court was right in allowing Khong's claim of RM1,729,000 for loss of rental/use of his seven lots of land as he had adduced evidence to show that the probable rental of the seven lots, consisting of the badminton complex, was about RM19,000 per month since December 2011 till to date. The High Court's award of RM30,000 for exemplary damages was also reasonable in view of the appellants' failure to transfer the seven lots to Khong, the effect of which was to cause Khong to suffer damages for loss of use/rental of those lands (see paras 37–39).

(2) The construction of the badminton complex on the seven lots that the appellants were supposed to have transferred to Khong had undoubtedly enhanced and improved the commercial value of the seven lots as the buildings could be rented out, generating income for Khong. It could not be disputed that the market value of the lands had appreciated because of the construction of the complex. Khong had unquestionably benefitted even though he did not request the appellants to construct the complex on his seven lots. The construction of the complex on Khong's seven lots was not intended to benefit Khong gratuitously. The enrichment or benefit to Khong was undoubtedly at the appellants' expense since they had obtained building and planning approval and had constructed the complex entirely through their sole effort and costs. It was unjust for Khong to retain the benefit as the appellants had not only suffered a loss, but Khong was at the same time made richer by the appellants' loss by the same amount (see paras 48–53).

(3) The appellants had constructed the badminton complex up to the stage of 80% when the parties were still in partnership and only when the balance 20% of the construction was remaining did the appellants unilaterally continue with the construction to complete the complex. It was at this stage that Khong sent a letter to the appellants urging that the construction be stopped. It was wholly unrealistic to stop construction when only 20% was left for completion. If construction was stopped it would have entailed a loss to all the parties. The appellants had therefore made out a case of unjust enrichment against Khong and the High Court erred in dismissing the appellants' counterclaim (see paras 55–57).

(4) As the total cost of construction of the badminton complex was RM2,409,000, 20% of that sum was RM481,800 of which sum Khong had to bear half, namely RM240,900. On the appellants' counterclaim for the loan taken from Public Bank Bhd and other expenses particularised in para [2](e) of the counterclaim amounting to RM786,000.08, that amount had to be borne equally (namely RM393,000.04) by Khong and the appellants since the loan taken to buy the lands and the expenses incurred were for the benefit of both parties (see para 60).

[Bahasa Malaysia summary

Perayu-perayu dan responden menandatangani perjanjian di mana, antara lain: (a) responden ('Khong') akan memindahkan semua sahamnya dalam perayu kedua ('P & K') kepada perayu pertama ('Pua'); (b) P & K hendaklah memindahkan kepada kedua-dua Khong dan Pua tujuh keping tanah komersial setiap satu mempunyai gadaian sedia ada ke atas tanah-tanah tersebut; dan (c) kesemua 14 keping tanah tersebut akan dibangunkan secara bersama oleh kedua-dua perayu dan Khong. Khong menyaman perayu-perayu di Mahkamah Tinggi dengan mendakwa bahawa walaupun beliau telah melaksanakan kewajipannya di bawah kontrak, perayu-perayu bukan sahaja gagal untuk memindahkan bahagian tujuh keping tanah komersial kepadanya tetapi secara sepihak telah meneruskan pembangunan kesemua 14 keping tanah tersebut menjadi kompleks badminton dan telah menyewakan kompleks tersebut untuk mendapatkan keuntungan sehingga menghalang penggunaan tanah tersebut dan menyebabkan beliau mengalami kerugian dan kerosakan. Khong memohon beberapa relif terhadap perayu. Dalam menentang tuntutan Khong, perayu berpendapat bahawa mereka dan Khong bersetuju untuk membangunkan kompleks badminton atas 14 tanah tersebut dan walaupun telah dipersetujui bahawa Khong harus berkongsi kos pembinaan kompleks tersebut secara sama rata dan menyelesaikan pinjaman bank yang diambil untuk membeli tanah tersebut, semua kos dan perbelanjaan dalam hal tersebut ditanggung sepenuhnya oleh perayu. Dalam tuntutan balas mereka terhadap Khong, perayu meminta bayaran RM1,204,500 (iaitu separuh bahagian Khong dalam kos pembinaan kompleks) dan jumlah

RM393,000 (iaitu separuh bahagiannya daripada jumlah pinjaman dibayar semula kepada bank serta caj lain yang berkaitan seperti cukai tanah dan taksiran). Mahkamah Tinggi membenarkan tuntutan Khong dan menolak tuntutan balas perayu. Mahkamah memutuskan bahawa walaupun perayu tidak membuktikan tuntutan balas mereka, Khong telah membuktikan tuntutannya dan menunjukkan bahawa beliau adalah pemilik benefisial tujuh keping tanah tersebut dan oleh itu, P & K memegang tanah tersebut atas amanah bagi Khong dan Pua terpaksa serta-merta menyebabkan pemindahan tanah-tanah tersebut kepada Khong dengan pemilikan kosong. Mahkamah juga memerintahkan perayu-perayu untuk bersama-sama dan/atau secara berasingan membayar Khong RM1,729,000 sebagai ganti rugi bagi pelanggaran kontrak, amanah dan tugas-tugas fidusiari dan kerana melakukan pencerobohan dan menafikan Khong penggunaan tanahnya. Mahkamah juga memberikan Khong RM30,000 sebagai ganti rugi teladan dan memberikannya injunksi yang menghalang perayu daripada terus menggunakan atau berurusan dengan tujuh lot tanah miliknya. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi. Ia telah didedahkan semasa perbicaraan bahawa pada masa kedua-dua pihak menandatangani kontrak, kira-kira 80% daripada pembinaan kompleks badminton telah siap dan kontrak hanya berkenaan dengan penyiapan baki 20%. Khong mengambil pendirian bahawa memandangkan perayu secara sepihak telah meneruskan untuk menyiapkan kompleks tersebut dan menanggung semua perbelanjaan mereka sendiri, walaupun beliau menyuruh mereka menghentikan kerja, mereka telah melanggar kontrak dan beliau tidak bertanggungjawab untuk menyumbang apa-apa bayaran ke arah menyiapkan kompleks tersebut dan prinsip pengkayaan yang tidak wajar tidak terpakai kepadanya.

Diputuskan, sebulat suara mengekalkan keputusan Mahkamah Tinggi atas tuntutan Khong dan membenarkan tuntutan balas perayu:

(1) Mahkamah Tinggi telah tepat dalam membenarkan tuntutan Khong sebanyak RM1,729,000 bagi kehilangan sewa/penggunaan tujuh lot tanahnya kerana beliau telah mengemukakan keterangan untuk menunjukkan bahawa anggaran sewa tujuh lot tersebut, yang terdiri daripada kompleks badminton, adalah kira-kira RM19,000 sebulan sejak Disember 2011 sehingga kini. Award oleh Mahkamah Tinggi sebanyak RM30,000 untuk ganti rugi teladan juga munasabah memandangkan kegagalan perayu-perayu untuk memindahkan tujuh lot tersebut kepada Khong, yang kesannya menyebabkan Khong mengalami ganti rugi kerana kehilangan penggunaan/sewaan tanah tersebut (lihat perenggan 37–39).

(2) Pembinaan kompleks badminton di tujuh lot yang sepatutnya dipindahkan oleh perayu kepada Khong sudah pasti telah meningkatkan dan menambah baik nilai komersial tujuh lot tersebut kerana bangunan tersebut boleh disewakan, menjana pendapatan untuk Khong. Tidak

dapat dinafikan bahawa nilai pasaran tanah-tanah tersebut telah meningkat kerana pembinaan kompleks tersebut. Khong sudah pasti mendapat manfaat walaupun beliau tidak meminta perayu membina kompleks tersebut di tujuh lot miliknya. Pembinaan kompleks di tujuh lot Khong tidak bertujuan untuk memanfaatkan Khong secara percuma. Pengkayaan atau faedah kepada Khong sudah pasti atas perbelanjaan perayu kerana mereka telah mendapat kelulusan bangunan dan perancangan dan telah membina kompleks sepenuhnya melalui usaha dan kos mereka sendiri. Ia adalah tidak adil bagi Khong untuk mengekalkan faedah kerana perayu bukan sahaja mengalami kerugian, tetapi Khong pada masa yang sama menjadi lebih kaya dengan kerugian perayu dengan jumlah yang sama (lihat perenggan 48–53).

(3) Perayu-perayu telah membina kompleks badminton sehingga tahap 80% semasa pihak-pihak masih dalam perkongsian dan hanya apabila baki 20% daripada pembinaan tersebut tinggal barulah perayu secara sepihak meneruskan pembinaan untuk menyiapkan kompleks tersebut. Pada peringkat ini Khong menghantar surat kepada perayu mendesak supaya pembinaan dihentikan. Ia adalah tidak realistik untuk menghentikan pembinaan apabila hanya 20% sahaja yang tinggal untuk disiapkan. Sekiranya pembinaan dihentikan, ia akan menyebabkan kerugian kepada semua pihak. Oleh itu, perayu-perayu telah mengemukakan kes pengayaan yang tidak wajar terhadap Khong dan Mahkamah Tinggi terkhilaf dalam menolak tuntutan balas perayu (lihat perenggan 55–57).

(4) Memandangkan jumlah kos pembinaan kompleks badminton adalah RM2,409,000, 20% daripada jumlah tersebut adalah RM481,800 yang mana Khong terpaksa menanggung separuh, iaitu RM240,900. Mengenai tuntutan balas perayu bagi pinjaman yang diambil daripada Public Bank Bhd dan perbelanjaan lain yang dinyatakan dalam perenggan [2](e) tuntutan balas berjumlah RM786,000.08, jumlah tersebut perlu ditanggung secara sama rata (iaitu RM393,000.04) oleh Khong dan perayu memandangkan pinjaman yang diambil untuk membeli tanah dan perbelanjaan yang ditanggung adalah untuk faedah kedua-dua pihak (lihat perenggan 60).]

Cases referred to

Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd [2012] 4 MLJ 59, CA (refd)

Banque Financiere de la Cite v Parc (Battersea) Ltd (1999) 1 AC 221, HL (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Sediperak Sdn Bhd v Baboo Chowdhury [1999] 5 MLJ 229, HC (refd)

Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue and another [2007] UKHL 34, HL (refd)

Appeal from: Civil Suit No 22NCVC-57–10 of 2016 (High Court, Kuantan)

Saha Deva a/l A Arunasalam (Ramesh Ebeneezer Jayaraj, Hon Kai Ping and Sarah Nabihah bt Mohd Yusof Chan with him) (HY Lee & Hee) for the appellants.
Bastian Pius Vendargon (Gene Anand Vendargon with him) (Bastian Vendargon) for the respondent.

Mohd Sofian JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court Kuantan dated 11 October 2019 after a full trial allowed the respondent's claim and dismissed the appellant's counterclaim with costs.

[2] For ease of reference, parties will be referred to as they were in the proceedings before the High Court, namely; appellants as defendants and respondent as plaintiff.

[3] Having considered the appeal records and the submissions of the parties in the appeal, it is our unanimous decision that the appeal is allowed in part with regard to the defendants' counterclaim and affirmed the order of the High Court with regard to the plaintiff's claim. We now give our reasons for the same.

THE BACKGROUND FACTS

[4] The plaintiff and the first defendant were in business together for many years in various enterprises and joint ventures for mutual advantage and with a view to obtaining profit jointly. The plaintiff and the first defendant were previously equal shareholders in the second defendant and the only directors of the second defendant.

[5] By a written agreement contained in the deed dated 22 March 2011 ('the deed'), entered into between the plaintiff, the first defendant, the second defendant and Sri Kuantan Home Builders Sdn Bhd, the plaintiff and the first defendant agreed to terminate their business relationship in accordance with the terms and conditions set out in the deed.

[6] It is perhaps pertinent to note the relevant clauses in the deed are as follows:

> Clause 3(a)
>
> The first (plaintiff) and second party (1st defendant) hereto have agreed to end their aforesaid business relationship by the first party (plaintiff) transferring all his shares in P & K SB (2nd defendant) to the second party (1st defendant) and/or his nominee/s.

A Clause 2(ii)(b)

The second party (1st defendant) shall cause P & K SB (2nd defendant) to transfer the 14 shop lands described in Clause 3(iii)(ii) of this agreement to the first (plaintiff) and second party (1st defendant) in equal share subject to the existing charge.

B Clause 2(ii)(e)

The second party (1st defendant) shall secure the release of all guarantee executed by the first party (plaintiff) in favour of P & K SB's (2nd defendant) creditors and shall indemnify and keep indemnified the first party (plaintiff) and his estate and effects against all such debts and liabilities guaranteed by the first party (plaintiff) and against all proceeding costs, claims and expenses in respect of them.

C Clause 3(iii)

P & K SB (2nd defendant) shall transfer the 14 shop lands to the first (plaintiff) and second party (1st defendant) subject to the existing charge in equal share.

D Clause 7

The parties hereto agree that the 14 shop lands shall be developed jointly by them.

[7] In accordance with cl 3(a) of the deed, the plaintiff had on 7 April 2011 E transferred all his shares in the second defendant to the first defendant and one Pak Lin Haw and had resigned as director of the second defendant on the same date.

[8] The plaintiff contended that the first defendant was in full control of F P & K Builders and that the first and the second defendant have breached the aforesaid relevant express terms of the deed and the supplementary agreement. Both the first and second defendant failed to effect the transfer of the specified seven lots of land to the plaintiff within a reasonable time.

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[9] The first defendant, had proceeded to complete the development of the 14 lots of land into a badminton complex by himself or through the second defendant sometime in November 2011 notwithstanding the fact that the plaintiff, by letter dated 18 July 2011 had given notice to the first defendant, H inter alia, to stop further development works on the plaintiff's seven lots.

[10] Subsequently, by a supplementary agreement dated 8 November 2011 ('the supplementary agreement') entered into between the same parties as those to the deed, it was agreed, specifically by cl 2 therein, that the 14 shop lot lands I would be divided between the plaintiff and the first defendant as follows:

(a) Lots HS (M) 41650 to 41656 for PT 50489 to 50495 to the first defendant; and

(b) Lots HS (M) 41657 to 41663 for PT 50496 to 50502 to the plaintiff.

[11] Further on the same date a novation agreement was signed but the second defendant, Sri Kuantan Home Builders Sdn Bhd and the plaintiff.

[12] The plaintiff claimed that the first defendant and the second defendant thereafter utilised and rented the badminton court on the said 14 lots (including the plaintiff's seven lots) and collected revenue therefrom. This is despite the plaintiff through his solicitor, Messrs Andrew David Wong & Ong, issuing a letter dated 21 March 2012, giving notice that the badminton court erected on the plaintiff's seven lots were not to be utilised or rented out.

[13] The plaintiff contends that the second defendant still holds the said seven lots of land as trustee (implied, resulting or constructive) for the plaintiff and is liable to account to the plaintiff for the same and for the use of the same.

[14] The plaintiff further contends that the first defendant and/or the second defendant continue to wrongfully occupy and use the said seven lots of land for themselves and are accordingly liable to account to the plaintiff for the use of the same and continue to wrongfully occupy and use the said seven lots of land for themselves.

[15] The plaintiff avers that the defendants act of trespass was committed, and is continuing, namely the usage of the plaintiff's lands as part of a badminton court complex ('the complex'), with a view to profit. The plaintiff also claimed that he has suffered loss and damage, inter alia, loss of revenue that he could derived from renting the seven lots of land belonging to him.

[16] The plaintiff alleged that the first defendant has breached his fiduciary duties owed to the plaintiff by, inter alia:

(a) utilising the plaintiff's seven lots of land for his personal gain or profit resulting in loss to the plaintiff; and

(b) disregarding the plaintiff's rights and interest in the said seven lots to the detriment of the plaintiff.

[17] Therefore, the plaintiff in their amended statement of claim at para [22] prays as follows:

(i) suatu deklarasi bahawa plaintif adalah pemilik benefisial bagi 7 lot tanah yang dikenalpasti sebagai Lot HS(M) 41657 hingga 41663 untuk PT 50496 hingga 50502;

(ii) suatu deklarasi bahawa defendan kedua memegang milikan 7 lot tanah tersebut, termasuklah hak-hak dan kepentingan dalam yang sama, sebagai pemegang amanah (tersirat, berbangkit atau konstruktif) bagi plaintif;

(iii) suatu perintah bahawa amanah yang melibatkan 7 lot tanah tersebut disempurnakan serta merta, dengan akaun-akaun dan siasatan yang diperlukan;

(iv) suatu perintah bahawa defendan pertama dan/atau defendan kedua membayar plaintif gantirugi ditaksirkan oleh pendaftar mahkamah bagi kemungkiran kewajipan fidusiari;

(v) terhadap kedua-dua defendan, suatu injunksi menghalang mereka daripada terus menggunakan 7 lot tanah plaintif tersebut, sama ada secara sendiri, melalui ajen-ajen, pekerja-perja mereka atau sebaliknya;

(vi) suatu perintah bahawa defendan pertama serta merta melaksanakan pindah milik 7 lot tanah tersebut daripada defendan kedua kepada plaintif selaras dengan terma-terma dan syarat-syarat surat ikatan tersebut, dan selanjutnya serta merta menyerahkan milikan kosong yang sama;

(vii) suatu deklarasi bahawa defendan pertama telah memungkiri kewajipan fidusiarinya kepada plaintif;

(viii) suatu perintah bahawa defendan pertama membayar plaintif gantirugi ditaksirkan oleh pendaftar mahkamah bagi kemungkiran kewajipan fidusiarinya;

(ix) terhadap kedua-dua defendan, suatu perintah bahawa mereka secara bersesama dan/atau berasingan membayar plaintif gantirugi sejumlah RM1,178,000 dan berterusan menurut perenggan 15 di atas, atau suatu jumlah lain yang mana mahkamah fikirkan sesuai hasil daripada kemungkiran mereka terhadap surat ikatan tersebut dan/atau perjanjian tambahan tersebut;

(x) suatu perintah terhadap kedua-dua defendan, bahawa mereka hendaklah bersesama dan/atau berasingan membayar kepada plaintif gantirugi am, gantirugi teladan dan/atau gantirugi keterlaluan yang ditaksirkan oleh pendaftar mahkamah kerana menceroboh keatas tanah plaintif dengan niat memperolehi keuntungan;

(xi) secara alternatif kepada perenggan (ix) di atas, suatu perintah bahawa akaun penuh dan betul diambil dengan mengambilkira kesemua keuntungan yang telah diperolehi dan jumlah-jumlah yang terhutang oleh defendan-defendan kepada plaintif bagi penggunaan 7 lot tanah plaintif tersebut sehingga ke hari ini;

(xii) suatu perintah bahawa defendan-defendan secara bersesama dan/atau berasingan membayar kepada plaintif kesemua jumlah yang didapati terhutang oleh defendan-defendan kepada plaintif selepas pengambilan akaun menurut perenggan (xi) di atas;

(xiii) faedah pada kadar 5% setahun atas apa-apa jumlah penghakiman dari tarikh penghakiman sehingga penyelesaian penuh;

(xiv) kos tindakan ini; dan

(xv) relif-relif lain dan/atau selanjutnya, termasuk semua akaun-akaun, siasatan dan arahan yang sewajarnya.

[18] In contesting the claims, the defendants averred that the plaintiff and the defendants had submitted plans for the construction of the complex on the 14 shop lands owned by the plaintiff and the first defendant, which plans were approved in 2009. In late 2010, the defendants commenced construction of the complex.

[19] The defendants argued that according to cll 7 and 9 of the deed, both parties have agreed as follows:

7. The Parties hereto agree that the 14 shops land shall be developed jointly by them.

9. The first and second party shall assume liability of the charge of the 14 shops land and shall indemnify and keep indemnified P & SB from the said charge.

[20] The aforesaid complex was completed in or around November 2011. The cost of the construction of the complex was RM2,409,000 (not including professional supervising fees by the defendants) and all the expenditures were borne by the defendants amounting to RM2,409,000.

[21] The defendant stated that based upon the said deed, it was agreed and understood that all expenditure and or costs incurred by the defendants for the construction of the complex is to be borne equally by the plaintiff and the first defendant. The defendants averred that the plaintiff has full knowledge that the defendants also incurred additional costs and both parties agreed that the additional costs to be borne equally by the plaintiff and the first defendant amounting to RM786,000.08.

[22] The defendant contended that para [3] of the supplementary agreement refers to all terms and conditions contained in the principal agreement (the deed) shall continue and remain in full force and the principal agreement shall be read and construed and be enforceable as if the supplementary agreement provisions were included in the principal agreement. Based on the agreements entered between them, the parties had agreed that the 14 shop lots to be developed together, which was developed by the defendants with all the expenses, including instalments to the bank and other ancillary payments be borne by the defendants which was to be borne equally.

[23] The defendant further alleged that a loan was taken with Public Bank Bhd in the sum of RM450,000 to purchase the 14 shop lots. The loan was paid in full by the defendants and the plaintiff agreed that the loan to be borne equally between them. The defendants then issued the statement of account with full particulars of income and expenses of the business of the complex to

the plaintiff. The defendant said that the plaintiff through his solicitor Messrs David Wong & Ong, had issued a notice dated 12 March 2012 to the defendants and demand the defendants to stop the business of the complex and put pressure upon the defendants to buy the plaintiff's seven shop lots at an unreasonable price without taking into account the expenditure incurred by the defendants for the construction of the complex. The defendants disagree with the plaintiffs claim and continue to have discussions with the plaintiff.

[24] The parties were in discussion regarding the sale of the complex and from an original price for the 14 shop lots which was previously agreed to be valued at RM675,847, the plaintiff during discussion with the defendants claiming for RM3.5m for his share and refused to take into account the expenditure and additional expenses incurred by the defendants aforesaid.

[25] Further, the defendants forwarded to the plaintiff the statement of income and expenses for the complex from year 2011 to 2016 (partial) and ready to pay the plaintiff's share of the profits to the plaintiff and offered to allow the plaintiff the running of the badminton court on the plaintiff's seven shop lots but the plaintiff did not acknowledge the statement of account. The defendants denied the loss suffered by the plaintiff and demand the plaintiff to strictly proof all the losses averred by the plaintiff.

[26] The defendants also had filed their counterclaim against the plaintiff as follows:

(a) RM1,204,500 being the half share of the cost of construction of the complex and/or damages to be assessed by the court;

(b) RM393,000 being the half share of the liability of the loan taken out with Public Bank Bhd and other related payments which was paid for in full by the defendants on behalf of the plaintiff;

(c) interest at 5%pa on the whole judgement sum from November 2011 until full payment and/or realisation;

(d) costs of action of the counterclaim; and

(e) any other relief that this court deems fit and reasonable.

THE DECISION OF THE HIGH COURT

[27] On 11 October 2019, at the conclusion of the trial, the learned High Court judge ('learned HCJ') had allowed the plaintiff's claims and dismissed the defendant's counterclaims.

[28] In arriving to this decision, the HCJ had identified issues that to be determined by her as follows:

(a) whether the defendants have breached the deed dated 22 March 2011 and the supplementary agreement dated 8 November 2011;

(b) whether the plaintiff is under obligation to pay half of the construction costs and other related costs based on cl 7 of the deed;

(c) whether the plaintiff is entitled to any damages against the defendants; and

(d) whether the defendants are entitled to the counterclaim against the plaintiff.

[29] After having considered the facts of the case, evidence by all the witnesses, the contemporaneous documents and submissions of the parties, and on the balance of probabilities, the HCJ makes the following findings and orders:

(a) the plaintiff has proven his pleaded case against the defendants;

(b) the defendants has failed to prove their pleaded counterclaim against the plaintiff and the court dismissed the counterclaim with costs;

(c) the plaintiff is the beneficial owner of the said seven lots;

(d) the second defendant holds the said seven lots on trust for the plaintiff;

(e) the first defendant do forthwith effect the transfer of the said seven lots from the second defendant to the plaintiff and hand over vacant possession of the same;

(f) an injunction restraining the defendants from further using or dealing with the said seven lots either by themselves or through their servants or agents or otherwise;

(g) the defendants do jointly and/or severally pay the plaintiff damages in the sum of RM1,729,000 for loss of use/rental at the rate of RM19,000 per month and still continuing from June 2019 until the date of which vacant possession is handed over to the plaintiff (these damages includes breach of contract, breach of trust, breach of fiduciary duties, trespass and/or unjust enrichment);

(h) the defendants do jointly and/or severally pay the plaintiff the exemplary damages in the sum of RM30,000;

(i) interest at the rate of 5% on the judgment sum from date of judgment till full its realisation;

(j) the defendants' amended counterclaim is dismissed with costs; and

(k) costs of RM40,000 to the plaintiff as agreed by both parties for both the claim and counterclaim subject to allocator fee.

[30] Dissatisfied with the decision, the defendants filed this appeal.

THE APPEAL

[31] This appeal is premised on the following grounds as stated in the memorandum of appeal as follows:

(1) The learned trial judge erred in law and in fact in accepting the valuation report tendered by the respondent as a report by an expert,

(a) in wrongly attaching too much weight to the said valuation report; and

(b) in allowing the valuation report's evidences, which are based upon hearsay and third party's documents; and

(c) in not accepting he actual evidence adduced by the first appellant of the breakdown of income and expenses of the implicated badminton court;

(d) in further, allowing the plaintiff/respondent's claim for loss of use of the badminton court; and

(e) in allowing the sum of RM19,000 per month based upon the valuation report tendered by the respondent; and

(2) The learned trial judge had erred in law and in appreciating the physical and psychological facts presented before the court.

(3) The learned trial judge erred in law and in fact when she failed to adequately consider the evidence of the respondent that—

(a) firstly, the respondent himself demanded that his portion of the badminton court within the Complex are not to be utilized; and

(b) secondly the undisputed evidence that the respondent refused to accept control and possession of his portion of the badminton court within the Complex when called upon by the first appellant.

(4) The learned trial judge erred in law and in fact when she allowed the respondent's claim for loss of use in the sum of RM19,000 per month without assessing the actual loss suffered by the respondent despite the respondent specifically pleading for assessment of damages in their pleadings prayed as such in their alternative prayers (paragraphs 22. (xi) and (xii)).

(5) The learned trial judge erred in law and in fact when she signified disapproval, condemnation or denunciation of the appellant's conduct, quite independently of any injury suffered by the respondent despite there being no evidence to support such findings of disapproval, condemnation or denunciation of the appellant's conduct; and

(a) That such findings of disapproval, condemnation or denunciation

of the appellant's conduct is contrary to the evidence lead and the conduct of the appellants; and

(b) The learned trial court judge erred in law and in fact in allowing exemplary or punitive damages to the respondent.

(6) The learned trial judge erred in law and in fact when she made a finding that the appellant had failed to jointly develop the Badminton court and therefore, breached a term of the agreement by failing to jointly construct the Complex; and

(a) When the learned trial judge failed to appreciate that it is an undisputed fact that the respondent was the joint partner/director with the 1st appellant in the 2nd appellant company when construction commenced and continued for most if not for the major part and duration of the construction prior to entering into further arrangements;

(b) The trial judge erred in law and in fact when she made a finding that the appellant breached the term of the agreement by failing to jointly develop the Complex;

(c) that it was not developed jointly; and

(d) The learned trial judge erred in law and fact when she equated construction of the Complex with Development of the Complex.

(7) The learned trial judge erred in law and in fact when she found that a trust had been created.

(8) The learned trial judge erred in law and in fact when she declared that the appellant had breached their obligation as a trustee.

(9) The trial judge erred in law and in fact when she failed to take into account the obligation of the appellant to pay the loan taken for the construction of the Complex.

(10) The trial judge erred in law and in fact when she failed to take into account the obligation of the respondent to contribute towards repayment of the loan taken for the purchase of the 7 parcels or lots of land and towards construction of the Complex.

(11) The learned trial judge erred in law and in fact when she failed to take into account the unjust enrichment to the respondent resulting from the transfer of the property to the respondent without accounting for the respondent's contribution towards the joint development of the Complex as agreed between the Parties.

(12) The learned trial judge erred in law and fact when she relied on evidence that were inconsistent with or contradicted contemporaneous documents.

(13) The learned trial judge erred in law and in fact when she failed to take into account that the appellant's act of continuing with and completing the construction works of the Complex is an act in mitigation in light of the financial obligations to the Financier (Bank) and to the respondent.

(14) The learned trial judge erred in law and in fact when she failed to appreciate the terms of the termination of the partnership agreement expressly stipulating that the transfers of the respondent's lots are subject to the charge in favour of the bank.

(15) The learned trial judge erred in law and in fact when she failed to consider the evidence that the appellant had utilised the revenue from letting out the badminton court within the Complex towards settlement of the bank loan in order to secure a discharge of the charge which included for the benefit of the respondent; and

(a) Which, is consistent with the agreement to jointly develop the Complex as well as the agreement that the division of the lots is subject to the charge in favour of the Bank; and

(b) That the appellant in addition to the quit rent and various expenses connected to the respondent's seven lots were paid by the appellant during the period up to discharge of the charge in favour of the Bank.

(c) The learned trial judge erred in law and in fact when she allowed the respondent's claim and the transfer of the seven lots to the respondent without accounting for all sums expended by the appellant would lead to an unjust enrichment of the respondent.

(d) The learned trial judge erred in law and in fact when she allowed the respondent's claim and allow the transfer of the seven lots to the respondent when in law and in fact the Complex was jointly completed and yet the appellants/defendants counterclaim was disallowed in total.

(e) The learned trial judge erred in law and in fact when she disallowed the appellants/defendants counterclaim when it was not disputed that the respondent/plaintiff did not contribute anything towards the costs of construction.

(f) The learned trial judge erred in law and in fact when she disallowed the appellants/defendants counterclaim when it was not disputed that part of the claim include quit rent/assessment and other payments due to local authorities or for utilities and for permits and licenses, all of which are connected to the respondent/plaintiff's seven lots.

(g) The learned trial judge erred in law and in fact when she disallowed the appellants counterclaim when despite acquiescence by the respondent to the completion of the construction of the Complex on the respondent's seven lots to his benefit and to the appellants detriment.

(h) The learned trial court judge had erred in law and in fact when declaring that the appellant had breached his duty as a trustee of the seven lots held by the respondent pending the successful completion of the construction of the Complex and discharge of the

charge in favour of the Bank with proceeds from the letting of the lots consistent with the understanding between the parties that the Complex is to be jointly developed by the appellants and the respondent.

(i) The learned trial judge erred in law and in fact when she failed to appreciate the contemporaneous documents before the court at the trial which showed that the appellant had continually acted in good faith and with clean hands as well as had taken all necessary steps to mitigate the circumstances faced as a result of the split that occurred between the parties at the behest of the respondent.

(16) The learned trial judge had erred in law and in fact when she failed to place sufficient weight to the unreasonable demands put up by the respondent in requesting the appellant to halt construction, in agreeing to jointly develop the Complex jointly but expecting the appellant to pay for the balance of the construction works, to discharge the charge without paying for the outstanding sum due on his seven lots.

(17) The learned trial judge erred in law and in fact in failing to attach sufficient or any weight to the appellant's expert valuation reports comprising of:

(i) for the valuation of the property for the bank of 14 lots of empty lands for the purpose of the loan financing for the purchase (i.e. for which the charge was created); and

(ii) The second valuation is of the completed the Complex on the 14 lots of land. Hence, it is not a valuation of the income that is derivable from the rental of the Badminton court.

THE SUBMISSIONS

[32] The plaintiff submitted as follows:

(a) the defendants, in breach of the relevant express terms of the deed and the supplementary agreement, failed to effect the transfer of the specified seven lots of land to the plaintiff within a reasonable time;

(b) the first defendant, in further breach of cl 7 of the deed, had proceeded to complete the development of the 14 lots of land by himself or through the second defendant and had completed the same sometime in November 2011. This was notwithstanding the fact that the plaintiff by letter dated 18 July 2011 had given notice to the first defendant, inter alia, to stop further development works on the plaintiff's seven lots;

(c) consequent to that, the second defendant still holds the said seven lots of land as trustee (implied, resulting or constructive) for the plaintiff and is liable to account to the plaintiff for the same and for the use of the same. The plaintiff avers that there is to be inferred a common intention

between the parties that the second defendant holds the said seven lots of land upon trust for the plaintiff; and

(d) the construction and development of the complex from the time of the termination of the partnership between the plaintiff and the first defendant was not done jointly, as a result of which the plaintiff among others suffered losses. Therefore, the plaintiff prayed for declaratory orders against the defendants that the plaintiff is the beneficial owner of the seven lots of land and that the second defendant is the trustee (implied, resulting or constructive) on behalf of the plaintiff.

[33] The defendant submitted as follows:

(a) at all time, the complex was to be constructed and completed jointly by the parties based on the factual and indisputable events in this matter, with the development and construction costs to be shared equally between parties. This is especially clear from the provisions of cll 7 and 9 of the deed dated 22 March 2011;

(b) the plaintiff failed to make any contribution towards his joint liability with the bank. Pursuant to cl 9 of the deed, both the plaintiff and the first defendant were liable to make payment for the loan taken with Public Bank for which the 14 lots were charged. The plaintiff failed to make any contribution even subsequent to the termination of the partnership, for which there was then outstanding the sum of RM378,464.58 (as at 30 March 2011) and RM362,953.09 (as at 30 June 2011);

(c) it was the defendants who eventually paid up the loan in full towards the end of 2015 and obtained the discharge of the property towards the end of 2015 or early 2016. As such, the plaintiff is liable to pay for the repayments made by the defendants on his behalf for which the 14 lots (including the plaintiff's seven lots) were later able to obtain the discharge;

(d) apart from the loan, there were other payments connected to the 14 lots for which payments were required by the authorities. These included among others the quit rent and assessment. The documents and amounts paid by the defendants are not in dispute;

(e) the particulars of the costs of construction amounting to RM2,409,000 was particularised in the statement of defence at para [2](c). In addition, the other costs incurred by the defendants amounting to RM789,000.08 had been also particularised at para [2](e) of the said defence;

(f) the plaintiff was fully aware, agreed and acquiesced to the development and construction of the BCC, the payment for the bank loan and other ancillary payment; and

(g) therefore, the defendants claimed in their counterclaim, among others, for the sum of RM1,204,500 being half share of the costs of construction of the complex and/or damages assessed by the court and a further sum of RM393,000.04 being half share of the liability of the loan taken out with Public Bank and other related payments which was paid in full by the defendants on behalf of the plaintiff. The failure of the plaintiff to make any contribution towards the liability to the bank as well as towards the construction costs had enabled the plaintiff to unjustly enriched himself inequitably.

OUR DECISION

[34] We agree with the learned HCJ that the defendants were in breach of the relevant express terms of the deed and the supplementary agreement, by failing to effect the transfer of the specified seven lots of land to the plaintiff within a reasonable time subject to the existing charge. However it is not disputed that the loan repayment to Public Bank had been fully paid.

[35] We also agree with the learned HCJ that whatever is stated in the written proposal by the plaintiff could not be relied upon as it was superseded by the deed. This is clear from the 'entire agreement clause' in cl 11 of the deed.

[36] As regard the claim for loss of rental/loss of use of the seven lots, it was the plaintiff's case that the defendant had wrongfully occupied the seven lots and had rented out the seven lots which comprised of the badminton complex to the public and collected the rental money.

[37] The plaintiff had adduced evidence by tendering the valuation report by Messrs Rahim & Co showing that the probable rental of the seven lots which consisted of the badminton complex was about RM19,000 per month since December 2011 till to date is the sum of RM1,729,000.

[38] We are constraint to agree with the learned HCJ that the plaintiff was entitled to damages for loss of rental/use being the sum of RM1,729,000. The claim for unjust enrichment by the plaintiff was rightly disallowed by the learned HCJ as it overlapped with claim for loss of rental/use which was allowed.

[39] The award of RM30,000 for exemplary damages by the learned HCJ is reasonable as a result of the plaintiff's refusal to transfer the seven lots to the

plaintiff. The effect of which the plaintiff had suffered damages for the loss of use and/or rental. We agree with the learned HCJ's award on exemplary damages.

THE DEFENDANT'S COUNTERCLAIM

[40] One of the pivotal issues in the claim by the defendant is whether the plaintiff is under an obligation to pay half (1/2) of the constructions costs and other related costs based on cl 7 of the deed.

[41] It was contended by the learned counsel that the learned HCJ had not considered the issue of unjust enrichment being one of the issues to be tried but went on the basis that the defendant had failed to prove documentary evidence to support the claim for construction costs totalling RM2,409,000.

[42] The plaintiff submitted that the development/construction was approximately 80% completed when the deed came into effect and parties agreed to terminate their business relationship.

[43] The remaining 20% construction was to be completed jointly as stipulated in cl 7 of the deed. Whilst the learned HCJ had found that the defendant had breached cl 7 of the deed by failing to jointly complete the development, but the defendant had unilaterally proceeded to complete the development/construction ignoring the plaintiff's letter dated 18 July 2011 requesting that the work be stopped.

[44] The plaintiff further submit that they are under no obligation to contribute towards the completion of the development/construction which was done by the defendant unilaterally and in breach of the deed. Hence the issue of unjust enrichment does not arise.

LAW OF UNJUST ENRICHMENT

[45] It is instructive to note that the House of Lords in *Banque Financiere de la Cite v Parc (Battersea) Ltd* (1999) 1 AC 221 and *Sempra Metals Ltd (formerly Metallgesllschaft Ltd v IRC* [2007] UKHL 34 has stated that a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:

(a) the plaintiff must have been enriched;

(b) the enrichment must be gained at the defendant's expense;

(c) that the retention of the benefit by the plaintiff was unjust; and

(d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[46] Nearer home unjust enrichment law is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief (see *Sediperak Sdn Bhd v Baboo Chowdhury* (1999) 5 MLJ 229; *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59 and *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* (2015) 2 MLJ 441).

[47] Hence the formulated question which the court has to consider are as follows:

(a) whether the defendant has made out a cause of action in unjust enrichment;

(b) the plaintiff has been enriched;

(c) that this enrichment was gained at the defendant's expense; and

(d) whether there are any special defences to the claim.

WAS THE PLAINTIFF ENRICHED?

[48] It is important to note that in the instant case, what is required to be returned to the plaintiff is not the only the seven lots that the defendant was supposed to have transferred to the plaintiff but on the seven lots were constructed buildings which is the badminton complex.

[49] It has undoubtedly enhanced and improved the seven lots in the form of a badminton complex which could be rented out and generated income to the plaintiff. It cannot be disputed that the market value of the land has appreciated because of the badminton complex built on it.

[50] The court is not persuaded by the argument of the learned counsel for the plaintiff that cl 7 does not expressly provide for construction costs to be shared equally. Clause 7 merely states that the development was to be conducted jointly. Since the defendant had breached the cl 7 by completing the development/construction unilaterally it has by implication exclude the plaintiff to bear part of the development/construction costs.

[51] The plaintiff has unquestionably benefitted even though it did not request the defendant to construct the badminton complex on its seven lots. The badminton complex built on the seven lots of land belonging to the plaintiff was not constructed to benefit the plaintiff gratuitously. Hence the court is of the view that the first requirement is satisfied.

WAS THE ENRICHMENT AT THE EXPENSE OF THE DEFENDANT?

[52] The defendant had not only built the badminton complex on the seven lots belonging to the plaintiff but had bone fide improved and enhanced the seven lots namely by obtaining building permission, planning approval and constructing the badminton complex all done entirely through the sole effort and costs of the defendant. By reason of the defendant unilaterally constructing the badminton complex on the seven lots of the plaintiff at its own costs had substantially enhanced in value. In our judgment, the enrichment or benefit of the plaintiff was undoubtedly at the expense of the defendant.

WAS THE ENRICHMENT UNJUST?

[53] The pertinent question to ask is whether it is unjust for the plaintiff to retain to the benefit (the unjust question). Based on the matrix of the present case, in our view, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount.

[54] There is obviously a sense of injustice at the defendant's expense which is centrepiece to the foundation of the relief of restitution premised on the law of unjust enrichment. The plaintiff in the instant case should not be allowed to reap the benefit at the expense of the defendant. The defendant had constructed the badminton complex up to the stage of 80% when the parties were still in partnership and only when the construction was at the stage of 20% that the defendant had unilaterally continued with the construction until its completion. It was at this stage that the plaintiff had sent the letter to the defendant urging that the construction be stopped.

[55] The court agrees with the learned counsel for the defendant that it would be wholly unrealistic to stop the construction when there was 20% left for its completion. If the construction was stopped it would entail losses to the defendant and obviously it would also mean that the plaintiff would also suffer losses since the construction was not completed. Be that as it may, the construction of the badminton complex on the seven lots of the plaintiff was not intended to be gratuitously with the plaintiff enjoying its benefit.

[56] Based on the reasons as adumbrated above, we are constraint to conclude that the defendant had made out a cause of action in unjust enrichment in that the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, and that the plaintiff's enrichment was unjust.

[57] It is our unanimous decision that the learned HCJ was plainly wrong with regard to prayer 1(iii) of the order dated 11 October 2019 that the first defendant do forthwith execute a memorandum of transfer of the seven lots from the second defendant to the plaintiff coupled with vacant possession. This order of the High Court failed to take into consideration the unjust enrichment by the plaintiff at the expense of the defendant in dismissing the defendant's counterclaim.

CONCLUSION

[58] There are two parts in this appeal by the defendants.

[59] On the appeal with regard to the plaintiff's claim, we are of the view that the learned HCJ was not plainly wrong in her findings and decision. Hence, we affirmed the said decision.

[60] On the second part of the appeal with regard to the counterclaim by the defendants, we are of the view that the defendant has made out a claim on unjust enrichment:

(a) on the claim for construction costs of the complex, the defendants have claimed the amount of RM2,409,000 on a 100% basis. There is evidence that at the time the plaintiff exited the partnership, the construction stage of the complex was at 80%. So, what remains to be completed was the 20%. We agree with the learned counsel for the plaintiff that, if at all the plaintiff is to bear the construction cost, it would be only on the 20% and taking into consideration that the parties have agreed to jointly bear the construction cost, the amount would be as follows:

> on the 100%, it is RM2,409,000, so on the 20%, it is RM481,800; and RM481,800 jointly/equally divided by 2, the amount would be RM240,900.
>
> So this is the amount which we are of the view that the defendants should be allowed to claim.

(b) on the claim for the loan taken from Public Bank Bhd and other expenses as particularized in para [2](e) of the counterclaim which amounted to RM786,000.08, we are of the view that this amount should be jointly borne by the plaintiff and the defendant equally (RM786,000.08 divided by 2 = RM393,000.04). This is so because the loan was taken from Public Bank to purchase the said lands for the benefit of both the plaintiff and defendant. Other expenses incurred as particularized in para [2](e) of the counterclaim, are also for the benefit of both the plaintiff and the defendant. We took note that at the time the plaintiff exited the partnership, the loan to the bank has not been fully

A settled. Hence, the expenses for the loan and all the expenses as particularized in [2](e) should be borne equally.

[61] In the premises, we find there are merits in the appeal by the defendants in the counterclaim and unanimously allowed the appeal. The order of the
B High Court dated 11 October 2019 is affirmed in part. In the circumstances of the case, in view of the fact that the court has affirmed the High Court decision with regards to the plaintiff's claim and also allowed the defendant's counterclaim, there shall be no order as to costs.

C *High Court's decision on Khong's claim affirmed and appellants' counterclaim allowed.*

Reported by Ashok Kumar

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